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Nos. 77-983, 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
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BRIEF OF RESPONDENT WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

OPINION BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the three petitions for review.

Petition No. 77-983 is a request by the State of Washington for review of two decisions by the Washington State

Supreme Court: *Puget Sound Gillnetters Association v. Moos* (hereinafter referred to as "Gillnetters"), 88 Wn.2d 677, 565 P.2d 1151 (1977) (App. D of the petition) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977) (hereinafter referred to as "Fishing Vessel 2") (App. B of the petition). This is the decision upon reconsideration of 87 Wn.2d 417, 553 P.2d 113 (1977) (hereinafter referred to as "Fishing Vessel 1") (App. F of the petition). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 in Washington did not create a special Indian fishing right entitling treaty Indians to an allocation of the harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish for Indian fishermen.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

The constitutional provisions, treaties and statutes involved which are hereinafter enumerated are reproduced in App. A.-1-9 petition No. 77-983.

Constitutional Provisions of the United States

(a) Article II, Section 2, *Powers of the President* .... A-1 (Section 2 Clause 2) (Presidential powers with the Advise and Consent of the Senate to make Treaties)

(b) Article VI, *Debts, Supremacy Oath*, No. 2, Supremacy A-2

(c) Amendment V, *Due Process* A-2

(d) Amendment X, *Powers Reserved to States or People* A-3

(e) Amendment XIV, *Citizenship rights not to be Abridged* A-3

Constitutional Provisions of Washington State

(a) Article I, *Declaration of Rights* (Section 12, *Special Privilege and Immunities Prohibited* A-4

Treaties

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties each contain similar fishing provisions and only those provisions are set forth in App. A-4-7 Pet. No. 77-983.

(a) Treaty of Medicine Creek, 10 Stat. 1132 ..... A-4

(b) Treaty of Point Elliott, 12 Stat. 927 ..... A-5

(c) Treaty of Point No Point, 12 Stat. 933 ..... A-5

(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939 ..... A-5-6

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(a) RCW 75.08.012, *Duties of the [Fisheries] Department* A-7-8

(b) RCW 75.08.080, *Rules and Regulations—Scope* [Fisheries] A-8-9

STATEMENT OF THE CASE

A. Introduction

The opening brief of the petitioner State of Washington contains certain facts applicable to the respondent Washington State Commercial Passenger Fishing Vessel Association ("Charter Boat Association") in No. 77-983. The Charter Boat Association adopts the State of Washington's Statement of the Case insofar as applicable.

The Washington State Commercial Passenger Fishing Vessel Association[1] is a group of citizens who have formed an association for the purpose of supporting, enhancing and furthering the interests of charter boat fishing in the ocean waters along the coast of the State of Washington. Membership of the Charter Boat Association consists of skippers and owners of charter boats, owners of charter offices in the ports of Ilwaco, Westport, and all Olympic Peninsula ports, including Neah Bay, Sekieu, LaPush, Agate Beach and Port Angeles. In addition, associate members of the Charter Boat Association conduct businesses affected by the charter boat industries such as restaurants, motels, and support services. (F.F.1, 2 App. G-3, Pet. 77-983)

B. Nature of Sports Fishing

The members of the Charter Boat Association are engaged in business commonly referred to as "sports fishing". There are approximately 350 to 400 charter boats operat-

1. Although the Washington Kelper's Association was originally a party to the instant litigation, it has not participated in any of the proceedings subsequent to the original trial of the case in Superior Court of the State of Washington. This brief is intended to reflect only the position of the Charter Boat Association.

ing from the Washington coastal ports, and, in the communities referred to previously, the industry exerts a major economic dominance.

The typical charter boat is a twelve to eighteen passenger vessel, between forty and sixty feet in length and representing an investment of between fifty and $150,000. (Test. Nyhus, Joint App. 7-8) These charter boats are taken for hire by sports fishermen for the purpose of catching chinook and coho salmon.

The impetus behind the present dispute between the State of Washington and the Charter Boat Association was the February 12, 1974 decision by the Honorable George C. Boldt in the case of *United States of America, et al. v. State of Washington, et al.*, 384 F. Supp. 312, *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. den.*, 423 U.S. 1086 (1976).

For a number of years prior to 1974, the sport catch limit in Washington coastal waters, including the northern portion of the straight of Juan de Fuca, had been three salmon per day, per fisherman. Likewise, the daily limit had been three fish per day per fisherman in the neighboring state of Oregon.[2]

Pursuant to the February 12, 1974, decision in *United States v. Washington, supra*, Judge Boldt, on March 22, 1974, entered an order providing for an interim plan, Paragraph 5 of which provided:

> The defendants (*inter alia* Department of Fisheries) will make significant reduction in the non-Indian fisheries, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathe-

2. There also exists a charter boat industry in Astoria, Oregon, and other Oregon fishing ports in the vicinity of the Columbia River, which compete directly with Ilwaco and Westport.

matical precision but in making such reductions will do so consistent with the concept of permitting the full harvest of fish.

(Interim Plan and Stay Order Pending Final Decision on Appeal, Jt. App. 230.)

On April 24, 1974, the Department of Fisheries, as a direct result of the decision of Judge Boldt, passed certain regulations affecting the Charter Boat Association, the major component of which, was a reduction in the daily fish limit from three fish to two fish (F.F. 7(a), 8, App. G-5, Pet. 77-983). The reduction in the fish limit per fisherman per day went into effect on June 15, 1974. The result was both immediate and devastating.

Traditionally, the sports fishing season in the State of Washington is at its peak from the middle of June through Labor Day in early September. Most boats are booked almost to capacity during these two and a half months (Test. Fender, Jt. App., 5).

As a result of the reduction of the fish limit on June 15, 1974, most charter boat operators experienced more than a two-thirds reduction in clients, with an even greater loss in income, compared with the preceeding year (Jt. App. 5, 7, 13). Many of the sports fishermen cancelling their reservations at Westport and Ilwaco went to Oregon instead, where the three fish limit continued in effect for sports fishermen (Jt. App. 13). The effect on the support services provided in the communities of Ilwaco and Westport such as restaurants and motels was similar, an immediate economic downturn, which, had it continued throughout the sports fishing season, would have, along with the charter boat operators, jeopardized their significant investments (Jt. App. 7-10).

C. History of Court Proceedings

In response to the decision by the Department of Fisheries to reduce the sports fisheries' limit from three fish to two fish effective June 15, 1974, the Charter Boat Association sought and was granted a preliminary injunction enjoining the enforcement of the fishery regulation pending a trial on the merits. At trial, the trial court declared the regulation reducing the salmon limit invalid as beyond the statutory authority of the director of the Department of Fisheries. On appeal, *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1976) the Washington State Supreme Court declared the case moot. On a petition by the State of Washington for a rehearing in the matter, however, the State Supreme Court, in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wn. 2d 296, 571 P.2d 1373 (1977) concluded that an allocation of a major portion of the fish resource to a small percentage of the population who participated in the fishery on a non-discriminatory basis, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and, further, that a treaty is not exempted from compliance with constitutional provisions of the United States Constitution.

SUMMARY OF ARGUMENT

Although a treaty is made the supreme law of the land by the Constitution of the United States, the federal government, neither in enacting a treaty nor in construing it, can suffer a contravention of the Constitution itself. The District Court and the Ninth Circuit Court of Appeals have given a construction to the various treaties at issue in this

case, and acted in furtherance of that construction so as to deny to all of the non-treaty citizens of the State of Washington the equal protection of the laws.

While it is undisputed that the various treaties have granted to the treaty Indians certain rights not possessed by other non-treaty citizens of the State of Washington, the scope of those rights is in dispute. In order to ascertain the scope of these rights, and necessarily the limitations upon either the State of Washington or the treaty Indians, it is necessary to analyze the extent of these parties' jurisdiction. From an historical perspective, it is the view of the Association that the limitations upon treaty tribes necessarily increases the extent of either federal or state influence. By the same token, while the attributes of the "quasi-sovereign" status of treaty tribes is recognized, the historical limitations upon the exercise of this status is also discussed. The conclusion is thus reached that given the limited nature of the "quasi-sovereign" status of Indian tribes in a pluralistic society, and the limitations expressed in the treaties themselves, when balanced with the underlying rationale for regulation of the salmon resource by the State of Washington, there is no rational basis for the State to impose upon its residents measures designed to regulate the resource apart from defined conservation prerogatives.

Even viewing the matter as one within the discretion of the district court in exercising its equitable powers to provide a remedy for a legal definition of a right, the remedy must be consistent with the right to be protected. In the context of the present dispute, the Association believes that the remedy promulgated by the district court and directly imposed upon the Association by the State of Washington cannot rationally be tied to the nature or scope of the perceived violation of the off-reservation treaty right.

Finally, the Association is of the belief that the district court violated fundamental principles of federalism inherent in our constitutional framework by syphoning from the State of Washington the management powers over the resource to the exclusion of the State and the creation of autonomous states in the various Indian tribes with the ability to exercise sovereign powers vested by the Constitution solely in either the federal government or the states.

ARGUMENT

A. The Stevens Treaties Neither Require Nor Permit a Fifty Percent Plus Allocation of the Washington Fishery to the Treaty Indians

The opening brief of the State of Washington contains a lengthy discussion of the questions presented under the above heading. No purpose would be served for the Charter Boat Association to engage in a similarly lengthy dialogue. The Association does, however, concur in, and therefore adopts, the reasoning outlined in the State's Opening Brief with respect to the historical analysis of the pertinent treaty language.*

In the Charter Boat Association's treatment of other issues presented for review, however, much of the Association's argument will complement and, in fact, add to the

*The United States and the various Indian tribes have contended that there is no controversy between the Charter Boat Association and the State. While the Association forthrightly concedes that it concurs in much of the State's position, the fact remains that it was the State's attempt to impose the regulations called for by the District Court that prompted this action. It should be obvious that in the context of Petition 77-983 there existed throughout this litigation an actual controversy, although the State was perhaps an unlikely and uncomfortable real party in interest. It should also not be forgotten that long before this action, the District Court denied the Association's motion to intervene in *United States v. Washington*.

argument presented by the State of Washington. To this extent, the Association believes that portions of its argument on other issues will enhance the Court's understanding and resolution of whether or not the Stevens Treaties require or permit a fifty percent plus allocation of the fish resources under the jurisdiction of the State of Washington to the treaty Indians.

B. A Special Allocation of the Fishery Resource to Treaty Indians When They Have an Opportunity to Participate in the Fishery on a Non-Discriminatory Basis and a Reduction in the Resource to Non-Treaty Fishermen Constitutes a Violation of the Constitutional Doctrines of Equal Protection

1. *Introduction*

Section A of the Argument of the State of Washington in its opening brief, which the Association concurs in and has adopted, contains primarily a factual analysis of the Stevens Treaties with the purpose of interpreting the treaties "in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 206 (1978).

It is the Association's position that not only from a factual standpoint do the Stevens Treaties not require or permit a fifty percent plus allocation, but, in addition, from a legal standpoint (both at the time the treaties were ratified as well as with the subsequent passage of the Fourteenth Amendment to the United States Constitution) holding such an allocation to be one of "a matter of law" would be impermissible.

2. *Scope of the Treaty Power*

Article VI of the Constitution of the United States provides that all treaties made under the authority of the

United States shall be the supreme law of the land. Under Article VI, a treaty is "binding within the territorial limits of the state as they are elsewhere throughout the dominion of the United States". *Baldwin v. Frank*, 120 U.S. 678, 683 (1887). The treaties executed by Governor Stevens are treaties within the meaning of Article VI of the Constitution.[3]

While it is true that a treaty is the supreme law of the land under Article VI, it is not true that it is supreme in the same sense as is the Constitution itself. A treaty is equivalent in legal respects to a law of Congress, and a subsequent act of Congress will repeal or annul a prior treaty as will a subsequent treaty annul a prior act of Congress. *The Cherokee Tobacco*, 11 Wall. (U.S.) 616 (1870); *Ward v. Race Horse*, 163 U.S. 511 (1896).

In an early case, it was stated by this court that Article VI of the Constitution:

> . . . has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is even made in respect to the Constitution itself. It is named in conjunction with treaties and acts of Congress as one of the supreme laws, but no supremacy is in terms assigned one over the other. And when it becomes necessary to determine whether an act of Congress repugnant to the Constitution could be deemed by the judicial power and operative law, the solution of the question was found by considering the nature and object of each species of law and the authority from which each emanated and the consequences of

3. *See* Appendix A-4-7, Pet. 77-983; *United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

> allowing or denying the paramount effect of the Constitution.

Taylor v. Morton, 2 Curt. 454, *aff'd*, 57 U.S. 481 (1868).

The injunction of *Taylor v. Morton* to consider the consequences of allowing or denying the paramount effect of the Constitution is well taken. For, if treaties are supreme in the same sense as the Constitution, then the executive, congressional and judicial branches of the government could quite clearly amend the terms of the Constitution whenever they propose and ratify, or construe, a particular treaty, so as to grant something not found in that instrument or deny something otherwise mandated by the Constitution.

In addition, treatment of a treaty in the same sense as that of the Constitution itself could have the undesirable effect of changing the character of our government or the relationship between the federal government and the respective states.

Because of the danger that exists in assigning to the treaty power the same level of authority as the Constitution itself, this Court recognized early in our nation's development that the treaty power, like the laws of Congress, are subsidiary to the Constitution. In *Whitney v. Robertson*, 124 U.S. 190 (1888) this Court held:

> By the Constitution, the treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, but if the two are inconsistent, the one last in date will control the other; . . .

While this Court's language in *Missouri v. Holland*, 252 U.S. 416 (1920) has been read by some courts[4] in an attempt to assign a broad reading to the interplay between the Constitution and the treaty power, this Court in *Reid v. Covert*, 354 U.S. 1 (1957) laid to rest any notion that a treaty may violate any section of the Constitution.

In *Reid*, the federal government argued that a section of the Uniform Code of Military Justice, which was enacted pursuant to treaties entered into between the United States and Japan and West Germany, respectively, required a military trial for non-service dependents and further argued that it could sustain as legislation that which "is necessary and proper to carry out United States obligations under the international agreements made with those countries." In response to this assertion that the clause in the Uniform Code of Military Justice could be upheld because of some supposed governmental obligation under a treaty, this Court stated:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress, or on any other branch of government, which is free from the restraints of the Constitution.

354 U.S. at 16.

In reaching this conclusion, the Court stated:

> There is nothing in this language (the supremacy clause) which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompany the drafting and ratification of the Constitution which even suggests such a result . . . *It would be manifestly contrary to the ob-*

4. *See e.g. United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

> *jectives of those who created the Constitution* as well as those who were responsible for the Bill of Rights—let alone alien to our entire Constitutional history and tradition—*to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.* In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

354 U.S. at 16 (emphasis supplied).

In seems evident that if the words of a treaty can not sanction a contravention of the Constitution, then a legal construction of those words cannot contravene the Constitution.[5] In *United States v. Washington, supra,* the Federal district court held, *as a matter of law,* that the words "in common with" mandated a fifty percent (50%) plus allocation of the harvestable fish to the treaty tribes.

3. *Treaties and the Equal Protection Component*

The preceding discussion focused upon the scope of the treaty power in conjunction with the overriding importance of the Constitution of the United States, and it was determined that no treaty either in its making or its later judicial construction can be allowed to violate any precept of the Constitution. In this section, the Association discusses the equal protection component "implicit in the phrase 'incommon with' ", *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 403 (1968).

Although the Fifth Amendment of the United States Constitution contains an equal protection component[6], this

5. In this regard, it was noted in *Reid, supra*: "The prohibitions of the Constitution were designed to apply to all branches of the National Government." 354 U.S. at 17.

6. Although the Fifth Amendment contains no "equal protection clause" as does the Fourteenth Amendment, the Fifth Amendment's due process clause forbids discrimination that is unjustifiable as to be violative of due process; thus, if a classification is invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process clause of the Fifth Amendment. Moreover, the Fifth Amendment provides the same basic safeguards as the equal protection clause of the Fourteenth Amendment and the general principles of the Fourteenth Amendment are incorporated within and applied to the Fifth. *Bolling v. Sharpe,* 347 U.S. 497 (1954) (Invalidating Racial Segregation in Public Schools of District of Columbia as violative of due process guaranteed by Fifth Amendment); *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Buckley v. Vallejo,* 421 U.S. 1, 93 (1976), "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

discussion will be limited to consideration of the propriety of a legal mandate requiring a fifty percent (50%) plus allocation to treaty tribes in conjunction with the Fourteenth Amendment.

The Fourteenth Amendment and its equal protection clause is properly analyzed in the present case since the alleged denial of equal protection asserted by the Association and other non-Indian fishermen came about as a result of the Federal District Court's mandate to the State of Washington and its Fisheries and Game Department to promulgate regulations curtailing or eliminating their fishing activities. The fishing regulations which the Association challenged in the State courts are thus the embodiment of the District Court holding that, as a matter of law, treaty Indians are entitled to a fifty percent (50%) plus allocation of the fishery resource. For purposes of equal protection analysis under the Fourteenth Amendment, the requisite State action is present.[7]

In addition, since the State of Washington can make no law denying to any person within its jurisdiction the equal protection of the laws, it cannot be forced to do so by the federal government. *Shapiro v. Thompson,* 394 U.S. 618

7. If an interpretation of an otherwise valid treaty leaves it open to Constitutional objections, laws or regulations made by a state implementing that interpretation must also fail.

(1969).[8] This precept only makes sense inasmuch as both the State and Federal Governments are bound by the Constitution and while the Fourteenth Amendment is not applicable to the federal government, whenever the federal government by law or judicial decree, requires the state to act, the state must act in conformity with the Fourteenth Amendment. Otherwise, the effect of the federal directive is to indirectly amend the terms of the Constitution. *Geofroy v. Riggs*, 133 U.S. 258 (1890).

4. *Scope of State Jurisdiction and Treaty Tribes*

The equal protection clause of the Fourteenth Amendment provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction equal protection of the law.

The equal protection clause secures to every person within the jurisdiction of the state, even if not a citizen thereof, the protection of its laws equally with its other citizens. *Yick Wo v. Hopkins*, 118 U.S. 369 (1886); *Takahashi v. Fish & Game Commission*, 30 Cal.2d 719, 185 P.2d 805, *reversed on other grounds*, 334 U.S. 410 (1948).

Since the Fourteenth Amendment is applicable only where the State of Washington has jurisdiction over a particular person, the threshold problem is to analyze the State of Washington's jurisdiction over Indians in light of the treaties.[9]

8. "Congress may not authorize the states to violate the equal protection clause . . . Congress is without the power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the equal protection clause." *See also Katzenbach v. Morgan*, 384 U.S. 641, 651 n. (1966).

9. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court, in rejecting the assertion that the federal government had exclusive jurisdiction over the Apache tribe for all purposes and that therefore the state was prohibited in enforcing any of its laws against tribal

Under the enabling act of February 22, 1889, 25 Stat. 76, through which Washington became a state, the people of the State of Washington disclaimed:

> Any right and title to the unappropriated public lands lying within the boundaries thereof *and to all lands lying within said limits owned or held by any Indian or Indian tribes; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress*. . .

(Emphasis supplied).

The apparent effect of the disclaimer clause above excerpted is that the State of Washington has no jurisdiction over persons living on Indian reservations except as ceded by Congress, or inherent in the dependent status of Indians.[10]

The extent of off reservation jurisdiction, of which we are only here concerned, has been fully recognized by this Court in *Mescalero Apache Tribe v. Jones*, where this court stated:

> But tribal activities conducted outside the reservation present different considerations . . . Absent express federal laws to the contrary, Indians beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.

411 U.S. at 148-149.

enterprises, whether the enterprise was located on or off tribal land, stated: "Generalizations on the subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, 6 Pet. 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of states, Indians and the federal government." 411 U.S. at 148.

10. This Court, in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (Puyallup III), rejected an argument by the tribe that they had a right to exclusive control of the steelhead run passing through the Puyal-

In *Mescalero*, this Court cited, as authority for the above excerpted proposition, *Puyallup I*, 391 U.S. 392, *Organized Village of Kake v. Egan*, 369 U.S. 16 (1962); and *Tulee v. Washington*, 315 U.S. 681 (1942).

In *Puyallup III*, this Court in construing the "in common" provision of the Treaty of Medicine Creek, reaffirmed its holding that the right to fish at those respective places was not an exclusive one. 433 U.S. 165 at 175.[11]

The rule that appears to have been formulated in recent years for determining the extent of state jurisdiction over off-reservation activities of Indians, was articulated in *Organized Village of Kake v. Egan, supra*, wherein this Court stated the test to be whether: "the application of that law would interfere with reservation self-government." 369 U.S. 60 at 68.

Applying this test in *Organized Village of Kake*, this Court stated: "But state regulation of off reservation fishing certainly does not impinge on treaty protected reservation self-government." 369 U.S. 75-75.[12]

The exercise of the governmental powers of the State of Washington as opposed to its exercise of its proprietary

lup reservation. In *Mescalero Apache Tribe v. Jones, supra*, this Court stated: "The upshot has been the repeated statements of this Court to the effect that even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." The limitations of tribal sovereignty and thus the increase of state and federal jurisdiction derived from their dependent status is set forth in *Oliphant v. Suquamish Tribe, supra*, and *United States v. Wheeler*, .. U.S. .., 98 S. Ct. 1079 (1978).

11. "Even where reserved by federal treaties, off reservation hunting and fishing rights have been held subject to state regulation." *Organized Village of Kake v. Egan*, 369 U.S. 60 at 75 (1962).

12. This same test was repeated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148.

powers (*See Organized Village of Kake v. Egan*, 369 U.S. 60, 67-70) is unencumbered in those areas outside of the reservation.[13]

In *Puyallup III*, this Court stated unequivocably that the rights to fish "in common" were not exclusive in the treaty tribes. Thus, consistent with *Tulee v. Washington, supra*, and *United States v. Winans*, the proprietary powers of the State of Washington are limited in accordance with the exercise by the treaty tribes of their off reservation treaty fishing rights. The State of Washington nonetheless possesses full governmental powers over the treaty tribes off reservation.

That the State of Washington has complete governmental powers over the treaty tribes when fishing off reservation and thus is mandated to govern in conformance with the Fourteenth Amendment of the United States Constitution is buttressed by considering the extent of state jurisdiction in conjunction with the "quasi-sovereign" status of Indian Tribes. This Court has recently considered the limitations upon the "quasi-sovereign status of Indian tribes in two cases, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *United States v. Wheeler*, ... U.S. ...., 98 S. Ct. 1079 (1978).

In determining whether the Suquamish Indian Tribe had the power to exercise criminal jurisdiction over a non-Indian for an alleged transgression of tribal law, on a reservation, this Court held, while acknowledging that Indian

13. In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 176, n. 15, this Court clarified that part of the Village of Kake opinion which purported to state that the analysis between "governmental" and "proprietary" powers applied even *on reservation*, by stating in *McClanahan*: "It (*Organized Village of Kake v. Egan*) did not purport to provide guidelines in areas set aside by treaty for the *exclusive* use and control of Indians." (emphasis supplied).

tribes do retain elements of "quasi-sovereign" authority, that the tribes' retained powers were not such that they were limited only by specific restrictions in treaties or congressional enactments. In addition, it was recognized that Indian tribes were proscribed from exercising those powers of autonomous states. 435 U.S. .... (1978), 55 L. Ed. 2d 222.

In the *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L. Ed. 25 (1831), it was held that since Indian tribes were completely under the domain of the United States, any attempt by any foreign nation to acquire their land or form a political connection with them would be considered an invasion of our territory. Thus, the Indian tribal authority was limited by the nature of their dependent status and their inability to exercise powers "inconsistent with their status".

At the same time, it was also recognized in *Oliphant* that from the formation of this Country and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. 435 U.S. ...., 55 L. Ed. 2d at 222. This Court concluded that by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their powers to try non-Indians. When read in conjunction with earlier opinions of this Court, the conclusions of *Oliphant* is undeniable—the "quasi-sovereign" status of Indian tribes can serve as a limitation on state powers only as it pertains to matters *solely and exclusively* Indian.

In those instances, where an Indian or an Indian tribe does not retain exclusive internal jurisdiction over his or its affairs, the full governmental powers of either the federal government or the state government are applicable.[14]

The principles enunciated in *Oliphant* were reiterated in *United States v. Wheeler,* .... U.S. ...., 98 S. Ct. 1079 (1978). In *Wheeler,* this Court was called upon to determine whether an Indian who committed a crime on an Indian reservation against another Indian could be tried both by the tribal court in accordance with tribal law as well as by a federal court. In rejecting a claim that the double jeopardy provision of the Fifth Amendment barred both prosecutions, a claim grounded upon a finding by the lower courts that the tribal government and the federal government were but one sovereign, this court again analyzed the "quasi-sovereign" status of Indian tribes.

In analyzing the sovereignty question, the Court recognized that Indian tribes were no longer possessed of the full attributes of sovereignty since their incorporation within the United States necessarily divested them of some aspects of sovereignty they previously exercised. In addition, this court recognized that by specific treaty provisions, they yielded up other sovereign powers.[15]

The sovereignty that the Indian tribes still possess is

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14. "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the government of the United States, or of the states of the union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they exist in subordination to one or the other of these two." *United States v. Kagama,* 118 U.S. 375, 379 (1886); *Organized Village of Kake v. Egan, supra; McClanahan v. Arizona State Tax Commission, supra.*

15. One such treaty provision yielding up powers of sovereignty were the various treaties at issue in this case, in which the Indians ceded their land to United States and gave up their exclusive right to fish in coastal and marine waters, preserving only the right to fish "in common" with the citizens of the Washington territory. *See e.g. Puyallup III,* 433 U.S. 165, at 176 and n. 16.

that not withdrawn by treaty or statute, or by implication as a result of their dependent status. *United States v. Wheeler*, 98 S. Ct. at 1086. One such attribute of sovereignty that this Court found was not divested in any of the foregoing ways by the Navajo tribe was the right of the tribe to charge, try, and punish its own members for violations of tribal law. The internal affairs of the tribe remained exclusively within the jurisdiction of whatever tribal government existed, if not withdrawn or altered by Congress. Thus, the quasi-sovereign status of the Indian tribe is preserved only with respect to internal affairs of the Indian tribe.

Indian tribal sovereignty does not extend, however, to the relations between an Indian tribe and non-members of the tribe. In *Wheeler*, this Court held that there was an implicit divestiture of sovereignty in those areas involving the relations between an Indian tribe and non-members of the tribe. .... U.S. ...., 98 S. Ct. at 1087. This Court went on to state that the necessary limitations on tribal sovereignty:

> . . . rest on the fact that the *dependent status* of Indian tribes within our territorial jurisdiction *is necessarily inconsistent with their freedom independently to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different type. They involve only the relations among members of a tribe.

.... U.S. ...., 98 S. Ct. at 1088. (Emphasis supplied)

There are only two sovereigns within the United States: the United States and the various states. *United States v. Kagama, supra*. Each acts within its own realm consistent with the powers retained on the one hand and given on the

other by the Constitution. Where the federal government acts in an area inconsistent with state power, then the state is precluded from acting. Where, however, the reach of federal power does not extend, a vacuum is not thereby created, but rather the state's inherent powers are preserved. By executing treaties with Indian tribes and by providing for *exclusive* federal control, as to certain relations, the federal government necessarily set a limit on the exercise of the state's governmental powers. On the other hand, where the federal government, through a treaty, does not act so as to vest exclusive control of a particular subject matter in a treaty tribe, then necessarily the state's governmental powers are left unaffected.

In the present case, when the federal government executed the treaties with the Indian tribes, it preserved exclusive control to the reservations in itself, save and except for those powers retained in the tribe.[16] On the other hand, in the same treaties, the Indians gave up or were divested of their quasi-sovereign powers off reservation; and by entering into relations with non-Indians through the "in common with" provision of their treaties, admitted, in the first instance, the federal government, and, later, the State of Washington, to the full exercise of their respective governmental powers over these relations.

While at times the intricate web of federally related Indian law and the limited, residual "quasi-sovereign" status of Indian Tribes, may serve as a limitation on state action or exclude state jurisdiction altogether, its absence in any given situation, necessarily requires that jurisdiction

16. "Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority' ". *Oliphant v. Suquamish Indian Tribe*, 435 U.S. . ., 55 L. Ed. 2d at 221.

over a particular activity be vested in the state. Since, in the present case, the Indians can exercise no quasi-sovereign power over off-reservation fishing because it was not only withdrawn in their treaties, but is necessarily inconsistent with their freedom independently to determine their external relations, *United States v. Wheeler*, ... U.S. ...., 98 S. Ct. at 1088, the state possesses full governmental power. And the state, in exercising these governmental powers, must do so consistent with the mandates of the Constitution.

At the time that the subject treaties were executed by the United States and the various Indian tribes, what is now the State of Washington was a territory. It has long been the settled law in this country that the United States, upon succession to any territory, held the same in absolute fee. *Johnson v. McIntosh*, 8 Wheat. 543 (1823). The aboriginal Indian title, although not one in fee, has been held to be one of exclusive right of occupancy. *Johnson v. McIntosh, supra*. Outside of the territory of the original thirteen colonies, the ultimate fee is located in the United States and may be granted to the individual states upon their admission to the union subject to whatever rights of Indian occupancy were then extant, *Missouri v. Iowa*, 7 How. 616 (1849) and not altered by Statehood Acts.

In the present case, the treaty Indians retained their aboriginal rights of exclusive use and occupancy only to those lands set apart in the treaties as reservations. As to all other lands, the Indians' exclusive rights were extinguished. With respect to fishing, and consistent with the title of all land being in the United States, certain lands were encumbered with an easement of non-exclusive

use so that the Indians might fish in common with the other citizens of the territory.

Although, with respect to those lands upon which the Indian tribes retained their right to exclusive use and occupancy, they could exercise sovereignty consistent with their dependent status, their sovereignty was necessarily divested in their relations with non-Indians.

At the same time that tribal sovereignty over areas outside of their exclusive use and occupancy was divested, the governmental power of, first, the United States and, then, the state, came into existence.

This Court, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. ...., 55 L. Ed. 2d 209, took note of the fact that within the political boundaries of the United States and thus, within the United States' ability to exercise its governmental authority, the United States "has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." 435 U.S. ...., 55 L. Ed. 2d at 222. As the State's opening brief makes clear, one of the personal liberties possessed by all persons within the confines of the territorial limits of the United States is the right to participate in the common fishery.[17] The Federal District Court and the Court of Appeals, in *United States v. Washington State, supra*, have sanctioned an unwarranted intrusion upon the personal liberty of many of the citizens of the United States, by restricting or eliminating their right to participate in the fishery.

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17. In *Martin v. Lessee of Waddell*, 16 Pet. 367, 412 (1842), this court stated ". . . [a] liberty of fishing in the sea or creeks or arms thereof as a public common of piscary and (might) not, without injury to their rights, be restrained of it. . ."

5. *Application of the Equal Protection Clause of the Fourteenth Amendment*

The basic concern of the Equal Protection Clause of the Fourteenth Amendment[18] is with state legislation, whose purpose or effect is to "create discrete and objectively identifiable classes." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 60 (1973). Equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated.

In the present case, the State of Washington, pursuant to the mandate of the Federal District Court, deemed itself obligated to distinguish between two classes of fishermen; treaty fishermen and non-treaty fishermen, this based solely upon the District Court's ruling as a matter of law that the "in common with" provision compelled a fifty percent plus allocation of the fishery resource to the treaty Indians.

The relevant state policy regarding regulation of the fisheries, and as found by the Washington State Supreme Court, has been to manage the resource in the same manner for the purpose of conservation. RCW 75.08.012 (App. A-7, Pet. 77-983); *Puget Sound Gillnetters Association v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977) (App.D. Pet. 77-983). This is the same purpose which this Court, in *Department of Game v. Puyallup Tribe Inc.*, 414 U.S. 44 (1973) (*Puyallup II*) found with respect to the off-reservation fishing rights of the various treaty Indians: "That the state can only regulate where reasonable and necessary for conservation." Regulation of both treaty and non-treaty

18. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."

persons for purposes of conservation on a non-discriminatory basis is a matter completely different, however, from an affirmative mandate to the state that it allocate numbers of fish between these two parties, without regard to conservation.

The usual reasons given by those supporting the District Court's allocation principles and mandate to the state to enact regulations to allocate is that the treaties have established two distinct classes of fishermen in the State of Washington.[19] (*See* Dissent of Utter, *Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276 at 298.) This conclusion, however, begs the question.

With respect to off-reservation fishery, there is no express federal law that has established two distinct classes of fishermen. As the above discussion in Parts 3 and 4 illustrates, the State of Washington has the ability to exercise full governmental power for purposes of conservation over all persons including treaty Indians because of the very *absence* of any federal law precluding that exercise. The inability of treaty Indians to exercise their quasi-sovereign powers outside of their own internal relations does not mean that a void in regulation is thereby created. Rather, the State has full powers of regulation save and except for those areas where it has been displaced either by an express Congressional enactment or by the residual sovereignty otherwise not limited either by the Indians themselves or by Congress. Thus, with respect to the

19. This conclusion ignores the distinction between on and off-reservation rights as well as, at the very least, the granting by the treaty tribes in the treaties, rights to the other citizens of the territory at least on par with those reserved to themselves through the "in common" language. It also confuses those instances of legislation dealing *solely* with Indians and other non-exclusive legislation dealing with both Indians and non-Indians. See also n.20, *infra*.

common fishery, the State has the power to regulate for conservation purposes; but, in doing so, it must not create special rights in any one group of fishermen unrelated to the purpose of conservation.[20]

Where all fishermen, whether Indian or non-Indian, have the opportunity to participate in the common fishery on a non-discriminatory basis, in areas outside of the reservations, and where the inherent police powers of the state can be extended only to conservation of the resource, then there is no rational basis for distinguishing between fishermen based upon whether they are participants in a treaty or not. The State can, for conservation purposes, regulate the manner of fishing, the size of the take, or otherwise restrict commercial fishing, *Puyallup Tribe v. Department of Game*, 391 U.S. 398 (1968) (*Puyallup I*), in a manner which does not discriminate against either treaty or non-treaty fishermen. *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*). Since both treaty and non-treaty fishermen use the same implements for fishing commercially for salmon outside of reservation lands, regulations when applied on a non-discriminatory basis to all classes of fishermen are rationally related to the State's purpose in conserving the resource.

Under the rulings of the federal district court in *United States v. Washington, supra*, the burden of conservation

20. *Morton v. Mancari*, 14 U.S. 535 (1974) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) are clearly distinguishable from the State's obligation in the present case. In each of these two cases, the court was concerned *solely* with congressional legislation dealing *solely* and *exclusively* with internal Indian Affairs and designed to promote Indian interest in self-government. cf *United States v. Antelope*, 430 U.S. 641 (1977) wherein the court noted at 649, n. 11: "It should be noted, however, that this court has consistently upheld the

of the resource is placed upon the non-treaty fishermen.[21] The conclusion that the State of Washington must restrict all non-treaty fishing for purposes of conservation before seeking to restrict treaty fishing for the same purpose, amounts to the imposition of a disability upon non-treaty fishermen not sanctioned by the extent of the State's powers over off-reservation fishing, and is inconsistent with the divestiture of tribal sovereignty outside its own internal relations, and, by necessary implication, the equal protection clause of the Fourteenth Amendment. The equal protection clause of the Fourteenth Amendment is a shield to protect an individual from State discrimination; it is not a sword to promote disentitlement.[22]

6. *There Is No Equitable Basis For the Fifty Percent Plus Allocation*

In *United States v. Washington*, 384 F. Supp. 312 (1974), the District Court held, *as a matter of law*, that the treaty provision preserving to the treaty tribes the right

federal regulations aimed *solely* at tribal Indians as opposed to *all* persons subject to federal jurisdiction." (Emphasis in original) And at n.12: "If state courts would have had no jurisdiction over respondent's case, then state law does not constitute a meaningful point of reference for establishing a claim of equal protection." Since, in the present case, the state has jurisdiction over the off-reservation fishing activities of both Indians and non-Indians, it is mandated to apply non-discriminatory regulations so as to provide all persons within its jurisdiction an opportunity to participate in a non-discriminatory fashion in the common fishery.

21. "If alternative means and methods of reasonable and necessary conservation regulation are available, the State cannot lawfully restrict the exercise of off-reservation treaty right fishing even if the only alternatives are restriction of fishing by non-treaty fishermen." *Rulings on Major Issues in This Case*: No. 6 (Jt. App. 87.)

22. The affront to the Equal Protection Clause is even more pervasive when it is considered that the great majority of fish caught in Washington waters are hatchery produced and paid for by non-treaty citizens of the State of Washington. cf. The concurring opinion of Justice White in *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*).

to fish in common with other citizens of the territory off reservation required, as a matter of law, the division of the resource between treaty and non-treaty persons. In implementing this legal ruling, the District Court then came up with the fifty percent plus allocation.

In the Ninth Circuit, the Circuit Court transformed this ruling of law into an exercise of the District Court's equitable discretion. The Circuit Court held that the allocation was not an abuse of the District Court's discretion.

Where all persons have the opportunity to fish in the common fishery on a non-discriminatory basis, there is neither room nor necessity for the imposition of any allocation formula. As an exercise of discretion in insuring non-discriminatory treatment, it is only where one party effectively preempts the resource, thereby precluding another party from an equal opportunity to enjoy its fruits, that an allocation is proper.

The three cases which have come before this Court involving the Puyallup tribe and the Department of Game provide the underlying rationale governing the necessity for any allocation of a fish resource.

The genesis of the Puyallup cases was the ban by the State of Washington on the use of set nets in fresh water streams or at their mouths. The State only allowed fishing for steelhead by hook and line. In *Puyallup I*, 391 U.S. 392 (1968) this court recognized that net fishing by the Puyallup Indians was covered by their treaty. 391 U.S. 398-399. In *Puyallup II*, this Court recognized that the ban on all net fishing in the Puyallup River for steelhead had the effect of granting the entire run to the sports fisherman. This Court stated: "There is discrimination here because

all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." 94 S. Ct. 330, 333.

In *Puyallup II*, this Court also recognized, however, that net fishing by treaty Indians could preempt the resource. Thus, as of *Puyallup II*, this Court recognized that the ban on net fishing allowed the non-Indians to preempt the resource, whereas the allowance of a net fishery could result in the preemption of the non-Indian fishery. There was, therefore, irreconcilable rights which had to be accommodated in order to allow both parties to fish with the gear they saw fit while at the same time preserving the resource. In this regard, the Court suggested an allocation formula.

In *Puyallup III*, 433 U.S. 165 (1977), the case was back on appeal to this Court at the behest of the tribe supported by the United States. In *Puyallup III*, the tribe asserted an exclusive right to the fish in the Puyallup River. In rejecting this argument, the court first held that the right to fish was not an exclusive one. More importantly, however, this court held that if Puyallup Treaty fishermen were allowed untrammeled, on-reservation fishing rights, they could preempt the resource completely.

> In this manner the treaty fishermen could totally frustrate the jurisdiction of Washington Courts and the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek.

433 U.S. 176.

The Court then upheld the allocation formula promulgated by the Superior Court and affirmed by the Washington Supreme Court.

The conclusion to be drawn from the three Puyallup cases is clear. Where treaty rights and the rights of non-treaty citizens are in conflict, the exercise of either right of which would completely preempt the resource so as to deny the other party its availability, nondiscriminatory treatment of either party requires that each be allocated a share of the resource. In this limited circumstance, allocation is a *remedy* to necessarily accommodate the rights of Indians under the treaty and the rights of other people, *Puyallup II*, 94 S. Ct. 333. But, the allocation itself springs not from either the treaty fishermen or the non-treaty fishermen having, as a matter of law, proprietary interest in the fish,[23] but rather from a recognition that they each have an equal opportunity to catch the fish without that opportunity being preempted by the other.

The situation described in the three Puyallup cases contrasts markedly from that present in the appeals now before the Court. Prior to the District Court's ruling in *United States v. Washington*, both treaty fishermen and non-treaty fishermen had an equal opportunity to fish and neither party preempted the other from the resource. Unlike the Puyallup case, therefore, there was no denial of the resource which could even remotely compel the District Court, in the exercise of its "discretion", to create such a drastic remedy.

Even though the Ninth Circuit held the allocation by

23. The effect of the District Court's ruling on the "in common" issue has created a proprietary interest in the fish by both treaty and non-treaty fishermen. This Court has consistently rejected any assertion of a property interest in fish or game. cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920). In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) this Court found such an assertion no defense to an Equal Protection claim. *Takahashi* is indistinguishable from the effect of the District Court's rulings in *United States v. Washington* and the State's attempts to comply with it here.

the District Court to be an exercise in discretion, that exercise of discretion in fashioning a remedy must be consistent with the alleged abuse *sought* to be remedied.[24] Where Indians and non-Indians have the right to participate in the fishery for Salmon on a nondiscriminatory basis, with neither group preempting the other's exercise of its rights, there is nothing upon which the District Court could exercise its discretion.

Even a relative inequality in the capacity of Indian and non-Indian fishermen to capture the fishery resource would not be justification for a district court to order the drastic remedy it did in *United States v. Washington*. This was made clear in *San Antonio Independent School District v. Rodriques*, 411 U.S. 1 (1973), wherein this Court, in denying an equal protection challenge to the Texas system of financing its public schools, found, at best, only a relative deprivation of educational opportunity as a result of the school funding system. Only where a defined class has sustained an absolute deprivation of a meaningful opportunity to enjoy a particular benefit would the equal protection of the laws be denied. 411 U.S. at 20.[25] The reasoning of this Court in *Rodriques* is applicable in the present case. It is consistent with this court's analysis of the three Puyallup cases.

24. "The scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). *See also, Puyallup III*, 433 U.S. 165, 177 n. 18.

25. "Whatever merit appellees' argument might have if a State's financing system occasion an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. 1, at 36-37.

C. The District Court's Assumption of Management Authority Over the Salmon Fishery and Its Ordering State Agencies To Perform Activities Not Authorized By State Statute Is Unlawful

1. *Introduction*

From the innocuous appearing determination of the District Court in *United States v. Washington* that the treaty tribes had a right to fifty percent plus of the harvestable salmon, the District Court embarked on an unprecedented course, arrogating complete power over the fishery resource in Washington waters and promulgating, as if it was a legislature, rules and regulations for the management of the Washington fishery resource. In so doing, the court created the concept of self-regulating tribes: entities that could fish at all places beyond the reach of the State's governmental powers. The court also prohibited the State of Washington from exercising its inherent police powers with respect to all off-reservation Indian fishing, while at the same time requiring the State to promulgate regulations restricting and limiting non-treaty fishermen from participating in the resource for purposes other than conservation.

In usurping the State's police powers and embarking upon management of the fishery resource, the court completely misapprehended the limited nature of tribal sovereignty on the one hand, and the inherent police powers of a State on the other. The result was that the District Court turned the Constitution on its head, creating autonomous states among the Indian tribes and emasculating the sovereignty of the State of Washington.

2. *The State of Washington Is Not Preempted From Exercising Its Police Powers Over Off-Reservation Fishing*

The asserted basis of the District Court and the Court of Appeals in prohibiting the State of Washington from regulating, for conservation purposes, the off-reservation activities of the treaty Indians was that the treaties themselves preempted the field of regulation by the State.

In light of the many cases that have come before this Court and in which this Court has held that the states have the ability to regulate off-reservation treaty authorized fishing by Indians,[26] it is difficult to perceive how the two lower courts could hold that the State regulatory power has been preempted. Even from a more contemporary perspective, the "quasi-sovereign" status of the Indian tribes is not such as would be consistent with their ability to determine their own external relations. *United States v. Wheeler,* .... U.S. ...., 98 S. Ct. 1079-1088 (1978).

Federal regulation is not the *sine qua non* of complete preemption.

> Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject permits no other conclusion, or that Congress has unmistakeably so ordained.

DeCanas v. Bica, 424 U.S. 351, 361 (1976), Quoting *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963).

Federal regulation preempts state power either where it

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26. *United States v. Winans,* 198 U.S. 371 (1905); *New York ex rel. Kennedy v. Becker,* 241 U.S. 556 (1916); *Tulee v. Washington,* 315 U.S. 681 (1942); *Puyallup Tribes v. Department of Game,* 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe,* 414 U.S. 44 (1973); *Department of Game v. Puyallup Tribe,* 433 U.S. 165 (1977).

occupies the field, or federal and state regulations are in conflict. The "in common" with provision in the treaties as off-reservation fishing rights belies any notion of occupation of the field. Similarly, the limitations on tribal sovereignty so as to allow tribes independently to determine their external relations belies any conflict with the underlying state's police power to conserve the resource through regulation.[27]

The absence of any authority upon which to ground preemption of the state's inherent police powers to regulate the fishery for conservation purposes repudiates the District Court's arrogation of power over the resource and likewise repudiates the District Court's creation of self- regulating tribes to the status of autonomous states on par with the State of Washington. This cannot be countenanced.[28]

3. *The Concept of Federalism Is Opposed to the District Court's Usurption of Power*

Although the supremacy of the central government has long been accepted,[29] it would be unwise to assume that the

27. The District Court's notion of preemption and the ascendance of the self-regulating tribes in an area otherwise within the state's police power, appears to be an attempt to resurrect the "federal instrumentality" doctrine long since repudiated by this court. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 150. The additional apparent reliance by the District Court on the "quasi-sovereign" status of Indian tribes as a basis for preemption was similarly cut to the bone in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

28. "Indian tribes are proscribed from exercising both those powers of autonomous states . . ." *Oliphant v. Suquamish Tribe, supra*, 435 U.S. . . ., 55 L. Ed. 2d at 221; Indians being within the geographical limits of the United States are under the political control of either the government of the United States or of the State. They may have limited legislative functions consistent with their dependent status, but they exist in subordination to either the United States or the States of the Union. *United States v. Kagama*, 118 U.S. 375, 379 (1886).

29. See *McCulloch v. Maryland*, 4 Wheat 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).

Constitution does not suppose the existence of states as independent entities. This supposition is most clearly expressed in the language of the Tenth Amendment.[30]

As Professor Tribe has noted:

> Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions of the Constitution as a whole.

Tribe, *American Constitutional Law*, p. 301 (1978).[31]

This Court has recently recognized the underlying importance of the federalism concept:

> That is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. This, perhaps, for lack of a better and clearer way to describe it, is referred to by many as 'our federalism" and one familiar with the profound debates that ushered our Constitution into existence is bound to respect those who remain loyal to the ideas and ideals and dreams of our federalism. The concept does not mean blind deference to states' rights any more than it means centralization of control over every important issue in our national government and its courts. The framers repected both these courses.

30. "The (Tenth) Amendment expressly declares the constitutional policy that Congress may not exercise in a fashion that impairs the states' integrity, or their ability to funtion effectively in the federal system . . ." *Fry v. United States*, 421 U.S. 542, 547, n. (1975).

31. *Texas v. White*, 74 U.S. (7 Wall.) 700 725 (1869): "The Constitution, in all its provisions, looks to an indestructable union, composed of indestructable states."; *The Federalist*, No. 46 at 330 (J. Madison), (B. Wright ed., 1951).

> What the concept does represent is a system in which there is a sensitivity to the interests of both the state and national governments and in which the national government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interefere with the legitimate activities of the states. It should be forgotten that the slogan 'our federalism' born in the early struggling days of our union of states, occupied a highly important place in our nation's history and its future. . .

Younger v. Harris, 401 U.S. 37 (1971).

Of course, the Association is not advocating a return to the days of unqualified "states' rights", a concept that reached its nadir at a time when the preservation of an "indestructable union" was at its ebb. Nonetheless, it is believed that the proper balance between the central and state governments has been lost in the present case by the actions of the District Court in pursuing its own notion of the supremacy clause, particularly in light of the District Court's own doubt concerning the nature and extent of this Court's holding on Indian treaty rights vis a vis the reach of the state's police power.

By advocating "federalism", the Association is not attempting a talismatic approach to the resolution of the very complex issues presented in these consolidated cases. Nonetheless, this Court has recognized that notwithstanding the apparent reach of the central government's powers under the Constitution, there are limits upon the exercise of federal power independent of the express limitations of the Constitution and inherent in the necessity of recognizing the separate and independent existence of the states.[32]

32. *See e.g., National League of Cities v. Usery*, 426 U.S. 823 (1976); Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 Yale Law Journal, 1165 (1977).

It would also seem to follow as a subsidiary element of federalism that it is beyond the ken of the federal government to usurp or direct the legislative process of the state government,[33] particularly where this Court has, on numerous occasions, assumed the existence of the state's regulatory power for conservation purposes over off-reservation fishing by treaty Indians.[34]

In pursuing its own notions of the supremacy clause in connection with its own view as to the power of the judiciary to effect remedial measures, the District Court has effected a curious meld of the legislative and judicial function.[35]

This melding of the legislative and judicial function in the context of fishery resource management within the jurisdictional boundaries of the State of Washington has become even more pervasive given the conscription of the State's resources to aid the District Court in implementa-

33. cf. *Maryland v. EPA*, 530 F.2d 215, 224-28 (4th Cir. 1975), *vacated and remanded per curiam sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 990-94 (D.C. Cir. 1975), *vacated and remanded per curiam sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 421 F.2d 827, 837-42 (9th Cir. 1975), *vacated and remanded per curiam*, 431 U.S. 99 (1977).

34. "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the nation and of the state in which they reside. It is quite another to uphold the similar exercise of congressional authority directed, not to private citizens, but to the states as states." *National League of Cities v. Usery*, 426 U.S. at 845.

35. "The Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . the judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society. . ." *The Federalist*, No. 78 at 522-23 (A. Hamilton) (J. Cooke Ed. 1961); "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." *The Federalist*, No. 47 at 324 (J. Madison) (J. Cooke Ed. 1961).

tion of its directives. The decisions of this Court and the overriding requirements of federalism clearly prohibit the invocation by the District Court of its equitable jurisdiction as a means of transforming the state into a federal puppet.[36]

CONCLUSION

In Petition 77-983, the Supreme Court of the State of Washington has held that the creation of a special Indian fishery and the granting of a proprietary interest in the salmon to treaty Indians by the federal district court, violated the equal protection clause of the Fourteenth Amendment.

An analysis of the nature of treaties and the "quasi-sovereign" status of Indian tribes, juxtaposed with the indisputable sovereignty of the individaul states, refutes the underlying rationale of the district court in promulgating a division of a resource previously available to all on a non-discriminatory basis. The analysis similarly refutes the creation by the district court of self-regulating tribes free to exercise their court-defined treaty rights apart from all state regulation predicated on conservation.

While the Association does not necessarily agree with the state court that the touchstone of the denial of equal protection is based upon race or ancestry, it does believe that one of the undeniable predicates of the transgression of the Equal Protection Clause is the placement of the burdens of both propagation and conservation of the resource on only one segment of the population. At the same time, that segment of the population being burdened with the responsibilities of propagation and con-

36. *See e.g., Nagel, Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stanford Law Review, 661 (1978).

servation has, through judicial fiat, suffered a disentitlement, indefensible, both as a matter of law and of equity.

The Association believes that as a matter of equity, the allocation of a resource is defensible for purposes of providing treaty Indians with a share of the resource for subsistence and religious and ceremonial purposes, purposes which otherwise might be preempted by both Indian and non-Indian commercial fishing. Relating the scope of any remedy to the scope of any alleged violation, however, cannot, in light of the off-reservation fishing rights of both Indians and non-Indians, sanction judicial usurpation of the state's inherent management powers of the resource, nor the creation of a proprietary interest in the resource between treaty and non-treaty fishermen.

DATED this 18th day of December, 1978.

Respectfully submitted,

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